

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TEDDY GUTHERZ and U.S. POSTAL SERVICE, JAMES A. FARLEY
BUILDING POST OFFICE, New York, NY

*Docket No. 00-621; Submitted on the Record;
Issued February 1, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that there was a \$2,313.88 overpayment of compensation in appellant's case; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

The Office accepted that, on April 18, 1988, appellant, then a 39-year-old letter carrier, sustained herniated L4-5 and L5-S1 discs, requiring May 12, 1988 laminectomies at L4-5 and L5-S1, when he fell from a stopped postal vehicle.¹ Appellant missed work intermittently through 1998, and received appropriate compensation benefits for periods of total and partial disability.²

In November 1998 appellant applied for optional retirement. In a January 14, 1999 letter, appellant elected "to retire in lieu of remaining on workers' compensation." Appellant acknowledged that the Office would then terminate his compensation benefits.

¹ Appellant's claim was initially denied by a June 8, 1988 decision. By decision dated November 30, 1988, the Office vacated the June 8, 1988 decision and accepted appellant's claim for L4-5 and L5-S1 herniated lumbar discs. The record demonstrates that appellant had three prior claims accepted: Claim No. A2-423084 accepted for a lumbosacral strain sustained on April 18, 1979; Claim No. A2-470031 accepted for a herniated lumbar disc; and Claim No. A2-515930 accepted for an August 2, 1983 right knee injury. These claims are not before the Board on the present appeal.

² Appellant was off work through August 15, 1988, returned to work August 16, 1988, sustained a recurrence of disability from April 11 to 14, 1989, returned to work April 17, 1989, and was again off work from November 28, 1989 through August 22, 1992. On April 24, 1995 appellant returned to work in a limited-duty position for 20 hours per week. Appellant continued in limited-duty, sedentary positions for 20 hours per week through November 1995, and was on leave without pay until October 20, 1996. On October 25, 1996 the employing establishment made appellant a modified job offer as a modified city carrier, within his medical restrictions. Appellant accepted this offer on November 28, 1996 and performed the position through 1997.

In a February 8, 1999 letter, the Office advised appellant that he was eligible to receive retirement benefits under the Office of Personnel Management (OPM) in lieu of compensation under the Federal Employees' Compensation Act. The Office explained that appellant could not simultaneously receive benefits under the Act and OPM.

On February 12, 1999 appellant elected to receive OPM retirement benefits in lieu of compensation, effective January 1, 1999. However, the record demonstrates that the Office continued to pay appellant's wage-loss compensation benefits through February 27, 1999. The Office issued appellant checks for the periods December 6, 1988 to January 2, 1999, January 3 to 30 and January 31 to February 27, 1999. The amount of compensation paid to appellant for the period January 1 to February 27, 1999 was \$2,313.88.

By notice dated April 8, 1999, the Office advised appellant of its preliminary determination that a \$2,313.88 overpayment of compensation had occurred in his case, as he received both compensation benefits and OPM retirement benefits for the period January 1 to February 27, 1999. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment, as he was advised by a February 8, 1999 letter that he could not simultaneously receive compensation and OPM benefits, yet did not return three compensation checks covering the periods December 6, 1988 through February 27, 1999 "in spite of knowing full well that [he was] not entitled to keep these...."

Accompanying the April 8, 1999 notice, the Office provided appellant with an overpayment recovery questionnaire and a form he could use to request waiver of recovery of the overpayment or a prerecoupment hearing. The record indicates that appellant did not complete or return the overpayment recovery questionnaire, request a prerecoupment hearing or waiver of recovery of the overpayment.

In a September 20, 1999 letter, the Office requested that OPM "[f]orward a check in the amount of \$2,313.85 as a reimbursement for compensation paid" from January 1 through February 27, 1999.

By decision dated September 20, 1999, the Office found a \$2,313.88 overpayment of compensation in appellant's case, as he elected OPM retirement benefits effective January 1, 1999, but continued to receive compensation through February 27, 1999. The Office found that appellant could "not receive benefits from both OPM and [under the Act] at the same time," but did not return the compensation benefits paid to him for the period January 1 to February 27, 1999.

In his October 27, 1999 letter requesting an appeal, appellant was concerned only that a \$2,313.88 deduction made from his OPM annuity had not yet been forwarded to the Office. Appellant did not contest the fact or amount of the overpayment, the Office's finding of fault, or any aspect of waiver.

Regarding the first issue, the Board finds that the Office properly found that there was a \$2,313.88 overpayment of compensation in appellant's case.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed his appeal with the Board on November 1, 1999, the only decision properly before the Board is the September 20, 1999 decision regarding the overpayment of compensation.

It is well established that an injured employee must make an election between compensation for disability and retirement pay; the employee may not receive both.⁴ Section 8116(a) of the Act,⁵ as well as the Act's implementing regulations at section 10.421(a),⁶ provides that "a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity. The beneficiary must elect the benefit that he or she wishes to receive, and the election, once made, is revocable."

In a January 14, 1999 letter, appellant elected "to retire in lieu of remaining on workers' compensation." Appellant acknowledged that the Office would then terminate his compensation benefits. On February 12, 1999 appellant elected to receive OPM retirement benefits in lieu of compensation, effective January 1, 1999.

However, the record demonstrates, and appellant does not dispute, that the Office paid him \$2,313.88 in wage-loss compensation benefits from January 1 through February 27, 1999 while he simultaneously received OPM retirement payments. The Board has reviewed the Office's calculations, and finds that the \$2,313.88 amount is accurate. Thus, the Office was correct in finding the \$2,313.88 overpayment of compensation in appellant's case.

Regarding the second issue, the Board finds that the Office properly determined that appellant was at fault in the creation of the overpayment.

Section 10.433(a) of the Act's implementing regulations provides, in pertinent part, that a "recipient who has done any of the following will be found to be at fault with respect to creating an overpayment ... (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)"⁷

There are several documents of record demonstrating that appellant "knew or should have known" that he was not entitled to receive OPM retirement benefits and wage-loss compensation simultaneously. In his January 14, 1999 letter, appellant elected "to retire *in lieu of* remaining on workers' compensation." (Emphasis added.) Appellant then stated that he knew that the Office would terminate his compensation benefits due to his election of OPM retirement benefits. Thus, appellant demonstrated actual knowledge that he could not receive both benefits

³ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁴ See *John Russell Miller*, 6 ECAB 544 (1954)

⁵ 5 U.S.C. § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ 20 C.F.R. § 10.433(a).

concurrently, as he knew that OPM benefits would be in place of his compensation, and that the Office would terminate his benefits effective on the date of his election. Also, the Office's February 8, 1999 letter advised appellant that he could not simultaneously receive benefits under the Act and OPM.

Yet, although appellant received three compensation checks from the Office for the period December 6, 1988 to February 27, 1999, encompassing the period after January 1, 1999 when his election of OPM benefits became effective, he did not return the checks to the Office, or otherwise notify the Office of the overpayment.

Thus, the Board finds that the Office properly found at fault in the creation of the overpayment, as the record demonstrates that he knew or should have known that he was not entitled to any wage-loss compensation paid to him on and after January 1, 1999, the date he elected to receive OPM retirement benefits in lieu of compensation.

The Board finds that it does not have jurisdiction to review the issue of the method of recovery of the overpayment, as appellant is no longer receiving compensation.⁸ Therefore, the Board cannot address whether the Office's decision to deduct \$2,313.88 from his gross annuity was proper.

The decision of the Office of Workers' Compensation Programs dated September 20, 1999 is hereby affirmed.

Dated, Washington, DC
February 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ *Robert S. Luciano*, 47 ECAB 793 (1996).